RAZMAN BIN HASHIM

v.

TETUAN SOUTH EAST ASIA INSURANCE CO.

HIGH COURT MALAYA, IPOH
TUAN KANG HWEE GEE JC
[CIVIL APPEAL NO. 12-1-1993]
1 APRIL 1995

INSURANCE LAW: *Motor Insurance - Statutory liability of insurers - Insured sued by pillion rider of motorcycle - Liability apportioned at 50:50 between insured and deceased motorcycle rider - Estate of deceased rider not a party to suit - Recovery summons for remaining 50% of judgment sum against insurer - Whether maintainable - Whether insurer wholly liable for judgment sum - Whether liability covered by terms of policy - Joint tortfeasors - Whether severally liable - Choice of whom to sue - Whether a matter of plaintiff's right and discretion - Section 80(1) Road Traffic Act 1958.*

WORDS & PHRASES: *"Liability" - "Any sums payable thereunder in respect of the liability" - Section 80(1) Road Traffic Act 1958 - Section 96 Road Traffic Act 1987.*

The appellant was a pillion rider of a motorcycle when it collided with a motor car driven by one Zamali. The motorcycle rider, as a result of the accident, succumbed to death. The appellant sued Zamali for damages, but did not choose to also sue the deceased's estate.

The learned High Court Judge gave judgment against Zamali in the sum of RM60,000 and made a further order apportioning liability between Zamali and the deceased rider at 50:50. On appeal, the Supreme Court reduced the award to RM45,000 but did not disturb the finding on the apportionment of liability. In consequence, the respondent, the insurer of the motor car, paid the appellant RM22,500, being 50% of RM45,000.

The appellant, dissatisfied with the payment, filed a recovery action against the respondent for the balance 50% of the judgment sum under s. 80 of the Road Traffic Act 1958. The learned Sessions Judge ruled, that the respondent was only obliged to pay 50% of the RM45,000 awarded, in view of the order on the apportionment of liability, and dismissed the claim. The appellant hence appealed.

Held:

[1] As the deceased motor cyclist by his estate was not a party to the suit in the present case clearly, the liability to pay "any sum payable thereunder in respect of the liability" under s. 80(1) of the Road Traffic Ordinance, 1958 must fall squarely on the shoulders of the respondent insurer alone, being clearly a "liability covered by the term of the insurance" as the insurer of the motorcar.

[2] The judgment of the High Court, Ipoh, in the present case did not go so far as to order that the driver of the car was liable for only 50% of the assessed general damages to the appellant. On the contrary it was explicit enough to order that "the defendant do pay the plaintiff the sum of Ringgit Sixty Thousand Only (RM60,000)" (reduced to RM45,000 by the Supreme Court). The judgment therefore ought to be enforced subject only to the said reduction. In so far as the other part of the order purporting to apportion liability between the deceased motor cyclist and the driver of the motor car, this could be safely ignored by applying the purposive approach to interpretation.

[3] The learned Sessions judge in dismissing the appellant's claim chose to ignore that part of the judgment that clearly orders the defendant to pay the judgment sum to the appellant. He based his decision only on that part of the judgment which apportioned the liability between the driver of the car and the rider of the motor cycle 50:50, without taking into consideration that the rider of the motor cycle was not a party in the suit, and consequently cannot be made to contribute the judgment sum to the appellant. His finding was clearly untenable.

[Appeal allowed]

Cases referred to:
Tan Chik bin Ibrahim v. Safety Life and General Insurance Sdn. Bhd. [1986] 2 CLJ 428 ***(dist)***
V.D. Sujatha v. G. Prabhakaran Nair [1988] 3 MLJ 261 ***(foll)***
Md. Jailani bin Ta'at v. Zoolkiplie bin Hj. Abdul Rahman & Anor. [1990] 2 CLJ 2580 ***(foll)***
Sundram a/l Ramasamy v. Arujunnan a/1 Arumugam & Anor. CLT JT (41) [1994] ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 10(2)
Road Traffic Act 1987, s. 96
Road Transport Act 1958, ss. 80 & 80(1)

Other source referred to:
Tort, Winfield and Jolowicz, 11th Edn., 581.

For the appellant - Sarjeet Singh; M/s. Sandu & Co.,
For the respondent - V.T. Singam; M/s. V.T. Singam & Co.,

JUDGMENT

Kang Hwee Gee JC:

This is an appeal from the decision of the Sessions Court, Sitiawan dismissing the appellant's claim under s. 80(1) of the Road Transport 1958 for the sum of RM39,877.38, being the balance sum of an award inclusive of interest and costs made against the respondent company in favour of the appellant in High Court Civil Suit No. 984/85.

In that suit the appellant was a pillion rider of a motorcycle when it collided with a motor car driven by one Zamali bin Haji Abdul Rahman. The rider of the motor cycle died as a result of the accident. The appellant sued the driver of the motor car but did not sue the estate of the deceased motorcyclist. The insurer of the said motor car was South East Asia Insurance Bhd., the respondent in this appeal. The appellant obtained judgment against the driver of the motor car which was worded in the following form:

> The matter coming up for hearing this day in the presence of Mr. Harbans Singh Counsel for the plaintiff and Mr. Manjeet Singh Dhillon Counsel for the defendant **and** upon hearing evidence of the parties and Counsel aforesaid.
>
> **It is hereby Adjudged** that the defendant do pay the plaintiff the sum of Ringgit Sixty Thousand Only (RM60,000) as General Damages for pain and suffering and loss of amenities with interest thereon at 8% from date of service of writ to date of judgment.
>
> **And it is ordered** that the defendant do pay the plaintiff costs of this suit.
>
> **And it is also ordered** that liability between the defendant and the deceased rider of the motorcycle BAG 7187 be apportioned on a 50:50 basis.

On appeal, the Supreme Court reduced the amount awarded to RM45,000 but did not disturb the order of the High Court with respect to the apportionment of liability between the defendant and the deceased rider which therefore remained at 50:50.

A salient point to note in the order of the High Court is that although the estate of the deceased rider was not a party to the suit, liability between the defendant and the deceased rider was apportioned on a 50:50 basis. Purporting to act under the order, the respondent as insurer of the motor car paid the appellant the sum of RM22,500 being 50% of the sum of RM45,000 for general damages which they contend was the only sum they were obliged to pay in view of the apportionment of liability.

Consequently, the appellant filed an action for recovery of the balance of the judgment sum against the respondent insurer, under s. 80 of the Road Traffic Act 1958 (now s. 96 of the Road Traffic Act 1987) at the Sessions Court. For ease of reference, s. 80 (1) is reproduced as follows:

> 80.(1) If, after a certificate of insurance has been delivered under subsection (4) of s. 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under para. (b) of subsection (1) of s. 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

Before me Counsel for the respondent contends that the Sessions Court was right in dismissing the appellant's claim as by reason of the apportionment, the insurer was liable to meet the appellant's claim under s. 80(1) of the Road Traffic Act 1958 only to the extent of 50% of the sum of RM45,000. The thrust of the respondent Counsel's argument is that the respondent as insurer of the motor car was only liable under the said section to satisfy the judgment which the High Court ruled the insured was liable for in accordance with the decision in *Tan Chik bin Ibrahim v. Safety Life and General Insurance Sdn. Bhd.* [1986] 2 CLJ 428.

Tan Chik's case involved a collision between a motor scooter carrying a pillion and a motor lorry. The motor lorry was insured by the respondent company and the motor scooter by another. The pillion rider of a motor scooter sued both the rider of the motor scooter and the driver (as well as the owner) of the motor lorry which were involved in the accident in which he was injured. The High Court found the rider of the motor scooter and the driver of the lorry equally to be blamed for the accident. The plaintiff then sought to enforce the whole judgment sum only against the respondent insurer of the motor lorry (Safety Life and General Insurance Sdn. Bhd.) Under s. 80 (1) of the Road Traffic Act 1958. The High Court held that the insurer was liable to pay only that part of the judgment which the driver and the owner of the motor lorry were liable, i.e., only half of the sum awarded.

The decision was confirmed by the Supreme Court on appeal. The Supreme Court found that both the driver and the rider were in fact joint tort-feasors and the High Court had apportioned both the liability as well as damages to be paid by the parties, presumably acting under s. 10(2) of the Civil Law Act 1956. For the purpose of a claim under s. 80(1) of the Road Traffic Act 1958 however, it was held that an insurer's liability, would be limited only to "any sums payable thereunder in respect of the liability", and in any case, only in respect

of "liability covered by the terms of the policy" as stated in the section. The "sums payable thereunder" means as far as the insurer of the motor lorry (Safety Insurance) was concerned the apportioned 50% liability as found by the Court. The "liability covered by the terms of the policy" means the liability in respect of insurance cover for the motor lorry and excludes the liability in respect of cover for the motor cycle which the insurer of the motor lorry was never under risk. It was held therefore, the appellant could only recover against the insurer that part of the judgment sum awarded against the driver of the motor lorry and could not be made liable for that part of the judgment awarded against the rider of the motor cycle.

In his submission Counsel for the respondent sought to convince me that in the context of the present case the term "any sums payable thereunder in respect of the liability" in s. 80(1) refers to the apportioned liability between the appellant and the deceased driver, i.e., 50% of the RM60,000 awarded which was later reduced by the Supreme Court to RM45,000. As that sum of RM22,500 had already been disbursed, the appellant should have no further claim against the respondent.

With respect, I am unable to agree. *Tan Chik's* case could be distinguished on the facts from the present case in so far as it orders the rider of the motor scooter to contribute 50% of the sum awarded. In the present case the appellant pillion rider only sued the respondent driver of the car. The rider of the motor cycle (by his estate) was not a party to the suit. Consequently the trial Court would not be in a position to order (and in fact did not so order) the rider to contribute 50% of the liability to the appellant plaintiff under s. 10(2) of the Civil Law Act 1956 as was done in *Tan Chik.*

As the deceased motor cyclist by his estate was not a party to the suit in the present case clearly, the liability to pay "any sum payable thereunder in respect of the liability" under s. 80(1) i.e., the sum of RM60,000 (reduced to RM45,000 by the Supreme Court) must fall squarely on the shoulders of the respondent insurer alone, being clearly a "liability covered by the term of the insurance" as the insurer of the motor car.

Undoubtedly, the order of the High Court in the present case appears to be somewhat incongrous to the extent that an apportionment of liability was made in respect of the deceased motorcyclist who was never a party in the suit thereby giving rise to problems in interpretation. But the judgment did not go so far as to order that the driver of the car was liable for only 50% of the assessed general damages to the appellant. On the contrary, it was explicit enough to order that.

> The defendant do pay the plaintiff the sum of Ringgit Sixty Thousand Only (RM60,000).

To give effect to the judgment under the circumstances, it may be unnecessary to apply the purposive approach if interpretation enunciated by Chan Sek Keong J in the Singapore case of *V.D Sujatha v. G. Prabhakaran Nair* [1988] 3 MLJ 261 that,

> where an order of Court is capable of being construed to have effect in accordance with or contrary to established principles of law or practice, the proper approach, in the absence of manifest intention, is not to attribute to the Judge an intention or a desire to act contrary to such principles or practice but rather in conformity with them.

The order to the defendant to pay the full sum to the plaintiff, it would appear is absolutely consistent with the established principle that a pillion rider who is merely a passive passenger on the motor cycle is always faultless and therefore could not be found to be contributorily negligent (see *Md. Jailani bin Ta' at v. Zoolkiplie bin Hj. Abdul Rahman & Anor.* [1990] 2

CLJ 2580. It is also consistent with the principle that a joint tort-feasor (in the present case the driver and the rider) are severally liable, irrespective of the degree of his blameworthiness, to the plaintiff who remains entitled to recover his whole loss from whichever defendant he chooses. (See Winfield and Jolowicz on *Tort* 11th Edn., 581.).

On the other hand the order apportioning the liability appears to be in clear breach of the principle of natural justice. A close parallel may be drawn with the Supreme Court case of *Sundram a/1 Ramasamy v. Arujunnan a/1 Arumugam & Anor*. CLJ JT (41) [1994], where it was held that it was neither right nor fair for the trial Court to conclude that the plaintiff's head injury had been caused by the prior collision involving the plaintiff's motor cycle and another motor cycle, without hearing the rider of that motor cycle who was not a party to the suit or called as a witness. Such a finding it was held, was in breach of the maxim, *audi alteram partem*.

The judgment of the High Court Civil Suit No. 984 of 85 in the present case in my view was clear enough in so far as it orders the defendant driver to pay the sum awarded to the pillion plaintiff and should therefore be enforced. In so far as the other part of the order purporting to apportion liability between the deceased motor cyclist and the driver of the motor car, this could be safely ignored by applying the purposive approach to interpretation.

It would appear that the learned Sessions Judge in dismissing the appellant's claim chose to ignore that part of the judgment that clearly orders the defendant to pay the judgment sum to the appellant. He based his decision only on that part of the judgment which apportioned the liability between the driver of the car and the rider of the motor cycle 50:50, without taking into consideration that the rider of the motor cycle was not a party in the suit and consequently (for the reasons already stated) cannot be made to contribute the judgment sum to the appellant. His finding was clearly untenable. Accordingly, I would allow this appeal with costs.